

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DENNIS L. CLAYBORN

Claimant

VS.

WALLBOARD SPECIALTIES, INC.

Respondent

AND

LIBERTY MUTUAL INSURANCE COMPANY

Insurance Carrier

Docket No. 1,017,453

ORDER

Claimant appealed the May 11, 2006, Award entered by Administrative Law Judge Kenneth J. Hursh. The Board placed this appeal on its summary docket for disposition without oral argument.

APPEARANCES

Steven C. Alberg of Olathe, Kansas, appeared for claimant. Bruce Wendel of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for a December 29, 2003, accident. In the May 11, 2006, Award, Judge Hursh found claimant's pre-injury average weekly wage was \$245.44 and that claimant failed to prove his post-injury earnings were less than 90 percent of that amount. Consequently, the Judge granted claimant permanent disability benefits under K.S.A. 44-510e based upon a five percent whole person functional impairment rating.

Claimant contends Judge Hursh erred. Claimant requests review of the Judge's findings regarding his pre-injury and post-injury earnings. In short, claimant requests a 73

or 75 percent work disability (a permanent partial general disability greater than the functional impairment rating) based upon a 100 percent wage loss and either a 46 or 50 percent task loss.

But claimant did not file his application for review with the Division of Workers Compensation until May 30, 2006. Accordingly, respondent and its insurance carrier object to this appeal as being filed untimely. Therefore, they request the Board to dismiss this appeal. In the event the Board reaches the merits of the appeal, respondent and its insurance carrier contend the Award should be affirmed as claimant's pre-injury wage was allegedly \$193.70 per week and that he earned \$480 per week after his injury driving a truck until he quit to make more money operating a dairy farm.

The issues before the Board on this appeal are:

1. Should the Board dismiss this appeal on the basis that claimant failed to file a timely application for review?
2. What is the nature and extent of claimant's injury and disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the parties' arguments, the Board concludes claimant's application for review was filed untimely and, therefore, this appeal should be dismissed.

Judge Hursh signed the Award on May 11, 2006. Therefore, the effective date of the Award was May 12, 2006.¹ And the parties had 10 days after the effective date, excluding Saturdays, Sundays, and legal holidays, to request review by this Board.² Consequently, the last day to request review of the Award was May 26, 2006.

The parties agree claimant did not file his application for review until May 30, 2006. The Board finds the request for review was untimely and this appeal should be dismissed.

Claimant's attorney argues he did not receive the May 11, 2006, Award until Monday, May 15, 2006, and that he forwarded the Award to claimant on Wednesday, May 17, 2006. He further argues claimant did not receive the notice of the Award until Wednesday, May 24, 2006. The following day, May 25, 2006, claimant's attorney mailed

¹ K.S.A. 44-525(a).

² K.S.A. 2005 Supp. 44-551(b)(1) and K.A.R. 51-18-2.

an application for review to the Division of Workers Compensation in Topeka, Kansas, and to its local office in Overland Park, Kansas.

The Board finds claimant had adequate time to perfect his appeal to the Board. Claimant's attorney received the Award on May 15, 2006, which was some 11 calendar days before the deadline to file the appeal. Consequently, this record fails to establish a lack of due process. Claimant's redress is with the legislature to extend the brief 10-day period to appeal to the Board.

AWARD

WHEREFORE, the Board dismisses this appeal.

IT IS SO ORDERED.

Dated this ____ day of August, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Steven C. Alberg, Attorney for Claimant
Bruce Wendel, Attorney for Respondent and its Insurance Carrier